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PRELIMINARY CHAMBER – EVOLUTION OR INVOLUTION IN THE ROMANIAN CRIMINAL PROCEDURE

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ABSTRACT: *This paper deals with two aspects referring to the procedure of the preliminary chamber, which could raise questions about the right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights: is the judge of the preliminary chamber compatible to judge the case on the merits, does the exclusively written and non-contradictory procedure respect the guarantee of the fair trial? The analysis of the two issues was made by comparing it with the Italian system, where our legislator inspired from.*

KEYWORDS: *preliminary chamber, fair trial, incompatibility, non-contradiction*
JEL CLASSIFICATION: *K 14, K40*

The institution of preliminary chamber, recently introduced in the Romanian legal system, along with the entry into force of the New Criminal Procedure Code, is an institution which has correspondent in other systems of law such as French law and Italian law: the investigating magistrate (*judge d` instruction*) respectively *giudice per l`udienza preliminare*. They were a source of inspiration for the Romanian legislature, however without fully taking the procedures from the above mentioned systems.

The prosecutor, after carrying out the criminal prosecution, may conclude that there is one of the causes that prevents the deployment of the criminal action and he will rule the closing of the case, or, if he considers that the conditions for the person to be prosecuted are fulfilled he will issue the indictment. In this second case, the Preliminary Chamber has the first role, as presented in the Italian literature, of conducting a judicial review on the performance of the criminal action, a review which features a "filter for hazardous accusations" (D. Siracusano, A. Galati, G. Tranchina, E. Zappala, 2004). It is a control exercised by the judge to verify if the charges made by the prosecutor are

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supported by evidence in order to justify arraignment with the probability of conviction (Gianniti, 1994).

The amendment of the Romanian Criminal Procedure Code in the light of the Constitutional Court and ECHR jurisprudence represented one of the objectives set by the criminal policy in terms of legislation. (Sabau-Pop, 2011).

According to the Recitals within the draft of the Criminal Procedure Code, in its original form (Anon., n.d.), by this institution it was intended to have the requirements of legality achieved, expediency and fairness of the criminal trial to be met, with the aim of creating a modern legal framework which should remove the excessive length of proceedings within the trial. Given the numerous condemnations of Romania at the European Court of Human Rights for the excessive length of the trial, it was considered that by the limitation in time of the examination of the indictment and the evidence adduced during the prosecution, the deficiencies that led to the conviction of Romania at the Strasbourg court could be eliminated[1].

This institution of criminal procedural law was seen by the Romanian legislature as causing a direct, positive impact on the timeliness settlement of a criminal trial and as removing a gap in the provisions of the former criminal procedure where the examination of the legality of the indictment, of the evidence adduced during the prosecution prevented the beginning of the criminal trial on an indefinite period. In this context, the procedure of the preliminary chamber contains rules that eliminate the possibility of subsequent restitution of the file to the prosecutor, within the trial, due to the fact that the legality of the evidence and arraignment are resolved at this stage.

But if on the one hand the legislature aimed by this institution to expedite the criminal trial in order to avoid future convictions of Romania at the European Court of Human Rights, on the other hand it ignored some aspects that could lead to new trials and convictions of the Romanian State at the Court in Strasbourg.

A first aspect that we want to emphasize is related to the judge who adjudicates this procedure.

One of the components of the right to a fair trial, guaranteed by Article 6 paragraph 1 of the European Convention on Human Rights is represented by the independence and impartiality of the court. Within the European Court of Human Rights case law, impartiality is defined as the absence of any prejudice or prejudgment regarding the judgment to be ruled within a process[2].

In its original form, before its entry into force, the Code of Criminal Procedure provided the principle of separation of the judicial functions and the incompatibility of the preliminary chamber judge to adjudicate the case on the merits. However, before its entry into force, this provision was amended so that the current form of the Code provides that the preliminary chamber judge may also adjudicate the case on the merits[3].

As noted before, the institution of preliminary chamber already has tradition in the Italian system, that is why I consider useful to examine this aspect in terms of the Italian legal system.

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[1] In this matter see ECHR Decision of 14 April 2009 in the case Didu v. Romania, ECHR Decision of 30 September 2008 in the case Drăgănescu v. Romania.

[2] CEDO, Case Piersack v. Belgium, Decision of 1 October 1982, paragraph 30.

[3] The doctrine stated that the reason for giving up to this incompatibility is exclusively financial (Nariţa, 2014)

According to Article 34 paragraph 2 of the Italian Criminal Procedure Code, the preliminary hearing judge is incompatible to judge the case on the merits.

This legal provision was supplemented by numerous decisions of the Italian Constitutional Court, which highlighted an important aspect: the magistrate is called upon to perform a task completed by a judgment on the merits after he expressed in a previous phase of the trial, an assessment of the consistency of the accusation finalized by the control on the legitimacy of exercising the criminal proceedings and arraignment[4]. Therefore, anyone in a previous phase trial or another trial expressed himself by evaluating the content of the criminal action and the possibility of the accusation or of the liability of the defendant, cannot be in the position to express subsequent judgments regarding the defendant without "being subjected to the weight of evaluation previously made" (M. Pisani, A. Molari, V. Perchinunno, P. Corso, 2004).

The specialty literature in law has expressed the view according to which there is a scale in the criminal trial, on which one passes from procedural doubt to procedural certainty regarding the criminal liability of the defendant. Thus, from the judgment of "possibility" contained in the conclusion ordering the remand in custody which requires the existence of serious indications of guilt *(fumus commissi delicti)*, and the need for prevention *(periculum libertatis)*, we proceed to judgment of "probability" contained in the judgment which orders the beginning of the trial (the judgment of the preliminary chamber), which needs the presence of evidence to finally get beyond all doubt to the judgment of certainty (procedural) contained in the judgment (Gianniti, 1994, p.87).

As we can see, the judgment given in the preliminary chamber is seen as a step which makes possible the shift from the "possibility" of criminal liability to the "certainty" of it. Therefore, as the judge who orders the arrest cannot attend the trial of the case[5], the more the judge of the preliminary chamber should be incompatible to hear the case as he does not evaluate only some solid clues (as in the case of the judge for rights and freedoms) and also the legality of the evidences that may ultimately lead to the conviction of the defendant. Not even the judge who orders the remand on custody may rule on the guilt and yet he is incompatible to hear the case on the merits.

Moreover, in the case in which the preliminary chamber judge, apprised with a complaint against the decision of the prosecutor of not ordering the arraignment presumes the complaint and orders the arraignment, he is forced to decline jurisdiction and to send the case to the random distribution[6]. Before this provision was introduced explicitly in the text of law, the High Court of Cassation, in resolving a review for uniform interpretation of law, by Decision no. XV-2006[7] stated that the judge, who, by conclusion, presumes the complaint, abolishes the resolution or the attacked ordinance and retains the case for trial holding that the evidence on record is sufficient for the proceedings regarding the judgment, becomes incompatible to rule on its merits.

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[4] See the Decision of the Italian Constitutional Court no. 401/1991 (Spangher, 2001).

[5] See in this regard the Decision of the High Court of Cassation and Justice no. 2974/2012 which states that "whenever the judge resolves the proposal for remand on custody during prosecution, he can no longer participate in the trial on the merits, appeal or recourse, otherwise the decision is null and void".

[6] Article 341 paragraph 7 section 2, Article 64 paragraph 4 and 5 Criminal Procedure Code.

[7] Published in the Official Journal of Romania no. 509/2006 – Official Journal of Romania no. 509/13 June 2006.

The motivation of the Supreme Court took into account two aspects: on the one hand the fact that the legislature decided that when based on reevaluation of evidence the court determines that the evidence was sufficient for arraignment and that the prosecutor did not exercised his specific responsibilities i.e. implementation of the criminal action and the act of apprehension, to transfer to the judge these procedural functions specific to criminal prosecution, in this case the judge broadly taking the specific activity of exercising prosecution functions and therefore becoming incompatible to judge on end the same cause. On the other hand, it is noted that, in such cases, the judge shall determine, indirectly, the judgment to be adopted in that case, yet this being another reason for incompatibility as stipulated in Article 47 paragraph 2 – Criminal Procedure Code.

If the preliminary chamber judge is apprised with a complaint against the ordinance of not proceeding to trial, according to Article 341 paragraph 7 section 2 Criminal Procedure Code, he will verify the legality of evidence and the prosecution will exclude the evidence unlawfully administered, and if there are sufficient legal evidence administered he will send the file to the random distribution. If the same judge of preliminary chamber receives the indictment from the prosecutor he will make the same reviews, except the "quantitative" evaluation of the evidence (does not verify whether there are *enough evidence,* the prosecutor being the one who decides if after the exclusion of certain evidence he orders the restitution). However, in the first case, the judge of the preliminary chamber becomes incompatible to judge on the merits, in the second case he does not. But, given that according to the Article 16 paragraph 1 letter c of the Criminal Procedure Code the criminal proceedings cannot be exercised if there is no evidence that a person committed the offense, it is more than obvious that the evidence in the file will lead (with high probability) to the conviction of the defendant, otherwise the prosecutor would return the file for completeness. Since the judge of the preliminary chamber considers them legal, and orders the arraignment, is it not an indirect pronouncement on the judgment to be given in this matter?

A second aspect relates to the non-contradictory nature of the proceedings in the preliminary chamber.

According to the law, a certified copy of the indictment and, where appropriate, authorized translation is communicated to the defendant to the place of detention or, if applicable, at the address where he resides or the place where the service of writs was requested, all these informing him about the procedure of the preliminary chamber, i.e. the right to hire a lawyer and the time of the communication, the period within which he may submit written requests and pleas in respect to the legality of administering the evidence and of carrying out the acts by the criminal prosecution bodies.

Thus, the other parties or the main procedural subjects are not given the opportunity to draft pleas or applications even if they justify an interest.

If the defendant submits requests or pleas, or if they are invoked *ex officio,* the judge of the preliminary chamber will communicate them to the prosecutor who can respond in writing within 10 days from communication.

It follows that the pleas raised by the court *ex officio* are only communicated to the prosecutor, the defendant being unable to rebut them.

Not even the response of the prosecution if it is formulated within the statutory period, is not communicated to the defendant, the latter being restricted from the right to

reply. Even if the prosecutor's response could be rebutted by the defendant, he will not have the possibility to do it.

The judge of the preliminary chamber decides by reasoned resolution, in the advising chamber, without the participation of the prosecutor and the defendant. The conclusion is immediately communicated to the prosecutor and to the defendant (so again the other parties are excluded).

The procedure of appeal is a written one, based on the same rules.

Finally, this procedure does not allow the administration of evidence, thus even if proving the unlawfulness of evidence is achieved only by administration of other evidence, the defendant will not have the possibility to do it. He will only be allowed to assert the illegality of proof; the judge having no evidence in this matter he will not reject it as invalid, thus in the trial stage an unlawful evidence will be taken into consideration. We wonder whether during the trial, the judge determines, however, that the evidence was unlawfully administered, would he declare it illegal then? No, and that is exactly because it was the role of the preliminary chamber.

Comparing again the new Italian Criminal Procedure Code, we see that the Italian legislature has complied to contradiction, in that although the case is held in the advising chambers, the prosecutor and the defense attorney[8] will mandatory participate, and the other parties are only summoned, but still, having the possibility to participate. The judge must verify if the contradiction is achieved. The legal provisions differ according to the procedural subject, for some contradiction being effective, for others the opportunity to participate would suffice. The presence of the prosecutor and the defense attorney is mandatory and for them contradiction is a reality and not just a potential (M. Pisani, A. Molari, V. Perchinunno, P. Corso, 2004). In this case, the defendant may make statements, evidence is administered[9], witnesses, experts can be heard and all parties are called on. As we can see, it is a procedure that fully respects the principle of contradiction.

We believe that this should have been the procedure adopted by the Romanian legislature, so as not to contravene the European Convention on Human Rights, by violating the right to a fair process.

ECHR pointed out that one of the basic principles of a fair procedure is contradiction. However, this implies that any act of the file should get to the parties so that they could express their arguments against its content. In the case Josef Fischer v. Austria, 17 January 2002, the Court determined that an act containing the written submission of the prosecution on the admissibility of the applicant's appeal was not communicated to them, and therefore there is a violation of Article 6.

In conclusion, the legislator sacrificed in favor of the celerity of the criminal trial fundamental guarantees of the right to a fair trial, aspect which, sooner or later will draw the intervention of the Constitutional Court or the court in Strasbourg.

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